

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	MB Docket No. 14-82
)	
PATRICK SULLIVAN)	FRN 0003749041, 0006119796,
(Assignor))	0006149843, 0017196064
)	
and)	Facility ID No. 146162
)	
LAKE BROADCASTING, INC.)	File No. BALFT-20120523ABY
(Assignee))	
)	
Application for Consent to Assignment of)	
License of FM Translator Station W238CE,)	
Montgomery, Alabama)	

To: Marlene H. Dortch, Secretary
Attn: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU'S RESPONSE
TO LAKE'S MOTION TO DISQUALIFY THE PRESIDING JUDGE**

1. On May 9, 2017, Lake Broadcasting, Inc. (Lake) filed a motion to disqualify the Presiding Judge in this matter, alleging, without any evidence, that the Presiding Judge has "demonstrated bias and prejudice against Lake and Lake's president, sole owner and director, Michael S. Rice."¹ Lake's untimely Motion appears to be nothing more than a last-ditch attempt to try to avoid a possible unfavorable decision against Lake and Michael Rice (Rice). As set forth below, the Acting Chief, Enforcement Bureau, through his attorneys, provides its response to Lake's Motion.

¹ Motion to Disqualify the Presiding Judge, filed May 9, 2017 (Motion); *see also* Declaration of Jerold L. Jacobs, Esq. Concerning the Motion To Disqualify Chief ALJ Richard L. Sippel, attached to the Motion (Jacobs Declaration).

Lake's Motion to Disqualify is Untimely

2. Pursuant to Section 1.245(b)(1) of the Commission's rules, a party seeking disqualification of a presiding officer must file its motion and supporting affidavit "not later than 5 days *before the commencement of the hearing* unless, for good cause shown, additional time is necessary."² Here, Lake waited to file its motion and the supporting affidavit until four days *after* the hearing concluded – and apparently only after it presupposed the Presiding Judge may rule against it.³

3. In addition, Lake failed to allege or show "good cause" why it needed additional time beyond that allowed by the Commission's rules. Indeed, many of the issues that Lake complains about as the basis for its Motion include "rulings by the Judge in discovery matters" that extend as far back as June 11, 2015. Without justification or any explanation for this delay – Lake waited until now to file its Motion. On this basis alone, Lake's Motion should be denied.

It is Improper to Consider Lake's Motion Before a Hearing Transcript is Available

4. In part, Lake's Motion challenges the Presiding Judge's conduct during the three-day hearing held May 3, 2017 through May 5, 2017. Yet, neither Lake's Motion nor the supporting affidavit from its counsel contains anything more than allegations of what it alleges occurred during the hearing and what it alleges was said. Without a transcript of the hearing, it simply reflects one party's memory of what happened during those three days without any means for verification. Respectfully, the Bureau suggests therefore that the Presiding Judge deny Lake's Motion as premature, providing Lake the opportunity to re-file after the complete hearing transcript has been made available on the Commission's electronic comment filing system

² 47 CFR § 1.245(b)(1) (emphasis added).

³ See, e.g., *Tri-State Financial, LLC v. Lovald*, 525 F.3d 649, 653 (8th Cir. 2008) (requiring a party to bring a motion to disqualify promptly is necessary to avoid the risk that a party might hold its motion as an option in the event the presiding judge rules against it).

(ECFS), as is standard at the close of a hearing. In the alternative, the Bureau respectfully requests that the Presiding Judge extend the deadline for the Bureau to fully address Lake's Motion until 5 business days after the release of the complete hearing transcript.

**The Presiding Judge's Interlocutory Rulings
Cannot Form the Basis for Lake's Motion to Disqualify**

5. The Commission has recognized that "the substance of an ALJ's interlocutory rulings" cannot form the basis for disqualification.⁴ As discussed above, Lake bases part of its Motion on "rulings by the Judge in discovery matters" that extend as far back as June 11, 2015.⁵ On this basis, as well, the Presiding Judge should deny Lake's Motion. Moreover, to the extent that Lake felt it was aggrieved by any of those interlocutory discovery rulings, it could have requested leave to file an application for review within five (5) days after the release of the Presiding Judge's orders.⁶ As the docket plainly reflects, Lake never requested permission to appeal any of the Presiding Judge's interlocutory discovery rulings.

Lake Has Not Otherwise Provided Any Basis for its Motion

6. In order to disqualify the Presiding Judge, Lake must demonstrate a personal bias or prejudice that would impair his ability to act in an impartial manner.⁷ As the Commission has recognized, ordinarily, in order to be disqualifying, "[t]he alleged bias and prejudice...must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."⁸ In addition, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings...do not constitute a basis for a bias or partiality motion unless they display a deep-

⁴ *In re Applications of WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989) (citing *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966)).

⁵ *See, e.g.*, Motion at 1-2.

⁶ *See, e.g.*, 47 CFR §§ 1.301(b) and (c).

⁷ *See id.*

⁸ *Id.* (citation omitted).

seated favoritism or antagonism that would make fair judgment impossible.”⁹ Moreover, courts have recognized that judges have “an obligation to litigants and their colleagues not to remove themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone...and facilitate judge shopping.”¹⁰ Lake has not demonstrated that any of the “errors” allegedly committed by the Presiding Judge rely upon knowledge he acquired outside of this proceeding.¹¹

7. In the absence of such a showing, Lake must demonstrate that the occurrences about which it complains “reveal the degree of deep-seated favoritism or antagonism” that would be otherwise required.¹² Here, again, Lake has failed to meet its burden. For example, Lake suggests that the Presiding Judge’s “most serious error” arises from his ruling on August 4, 2015, when he permitted the Bureau’s psychological expert, Dr. Weitzl, to inquire into Rice’s “‘mental state’ prior to his imprisonment.”¹³ Lake contests this ruling because it led to the eventual admission of documents, maintained by the Missouri Department of Corrections concerning Rice’s mental state before, during, and after his incarceration, into evidence at the hearing.¹⁴ Lake has failed to explain how allowing such evidence into the record demonstrates “a deep-seated favoritism or antagonism” on the part of the Presiding Judge “that would make fair judgment impossible.” Indeed, as the record reflects, it was Lake who placed at issue Rice’s

⁹ *Id.* (citing *Liteky v. U.S.*, 510 U.S. 540, 555 (1994)).

¹⁰ See *In the Matter of National Union Fire Ins. Co. of Pittsburgh, Pennsylvania*, 839 F.2d 1226, 1229 (7th Cir. 1988).

¹¹ See Motion and Jacobs Declaration.

¹² See *In re Family Broadcasting, Inc.*, 17 FCC Rcd 19332, 19333-34 (2002).

¹³ Jacobs Declaration at 2 (citing Order, FCC 15M-26 (ALJ, rel. Aug. 4, 2015)).

¹⁴ See *Id.*

mental state and his efforts at rehabilitation – which are also described in the Missouri Department of Corrections documents – by filing the Application.¹⁵

8. Lake also suggests that the Presiding Judge’s *voir dire* questioning of Rice on the first day of the hearing demonstrates his bias.¹⁶ Specifically, Lake suggests that “the Judge expressed incredulity” when Rice could not remember events concerning the crimes he committed.¹⁷ Without a transcript from the hearing, it is impossible to identify any such expressions of “incredulity” that Lake may be referring to or the context in which they may have been stated. Lake’s undocumented characterization of the record alone cannot form a basis to disqualify the Presiding Judge.

9. Lake further complains about the Presiding Judge’s failure to rule on the motion *in limine* it filed prior to the hearing to disqualify the Bureau’s expert witness, Tamara Gremminger.¹⁸ Instead, the Presiding Judge ruled the motion was premature until “after Lake’s counsel has examined the witness during *voir dire*.”¹⁹ Lake appears to complain that the Presiding Judge failed to conduct a sufficient *voir dire* on the issue of whether earlier in the year Ms. Gremminger had been intimidated by Rice or others working on his behalf not to assist the Bureau in this case.²⁰ Lake contends that the net effect of the Presiding Judge’s failure to rule on its motion and his incomplete questioning of Ms. Gremminger made her “appear to be a credible witness...or maybe even an expert.”²¹ Lake also suggests that the Presiding Judge’s questioning “at length” of Ms. Gremminger concerning an undocumented report of children seen coming and

¹⁵ See Order, FCC 15M-26 (ALJ, rel. Aug. 4, 2015).

¹⁶ See Jacobs Declaration at 2.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Order, FCC 17M-22 (ALJ, rel. Apr. 27, 2017).

²⁰ See Jacobs Declaration at 2.

²¹ Jacobs Declaration at 2.

going from Rice's house during his parole "revealed his bias against Mr. Rice."²² Without a transcript from the hearing, however, Lake has not – and cannot – point to any specific question which suggests the Presiding Judge's alleged bias. Moreover, Lake fails to acknowledge that, regardless of the Presiding Judge's questioning, its counsel had ample opportunity to question Ms. Gremminger concerning her background, her expertise, and the allegations of intimidation and, through that questioning, to challenge her credibility. In addition, Lake has an additional opportunity in its proposed findings and conclusions of law to challenge the weight that should be given to Ms. Gremminger's testimony.²³

10. Lastly, Lake appears to question the Presiding Judge's ability to weigh the record with impartiality because, when, at the end of the hearing counsel for Lake indicated his clients' intention to withdraw the Application and move to dismiss the case, the Presiding Judge suggested that any such motion be accompanied by a declaration from Rice that he would not file any additional applications with the Commission.²⁴ Here again, there is no transcript available from the hearing. However, as counsel for the Bureau recalls the exchange, the Presiding Judge was merely articulating the obvious result if he were to grant a motion to dismiss without such a declaration from Rice – *i.e.*, the Commission would need to spend additional public resources and time to re-litigate the same issues that had already been addressed in this proceeding. The Presiding Judge did not require Rice to provide such a declaration and has not yet ruled on Lake's motion to dismiss.²⁵ It is difficult to see, therefore, how this exchange offers any evidence of the Presiding Judge's bias against Lake or Rice justifying disqualification.

²² *Id.* at 3.

²³ *See* 47 CFR § 1.263.

²⁴ *See* Jacobs Declaration at 4.

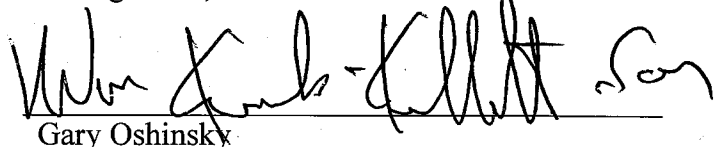
²⁵ *See, e.g., Order*, FCC 17M-23 (ALJ, rel. May 5, 2017).

Conclusion

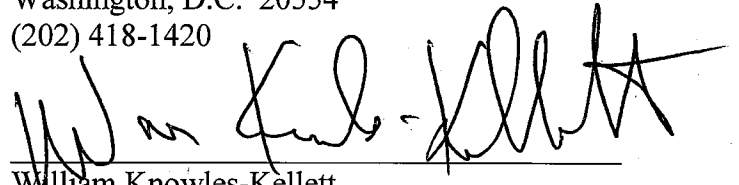
11. For the reasons set forth above, the Bureau respectfully submits that Lake has failed to meet the substantial burden of showing that the Presiding Judge has a personal bias or prejudice against either Rice or Lake that would impair his ability to act in an impartial manner. As such, the Bureau respectfully submits that Lake's motion to disqualify should be denied.

Respectfully submitted,

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May 18, 2017

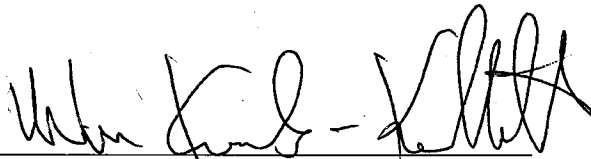
CERTIFICATE OF SERVICE

William Knowles-Kellett, an attorney in the Enforcement Bureau's Investigations & Hearings Division, certifies that he has on this 18th day of May, 2017, sent by first class United States and by email copies of the foregoing ENFORCEMENT BUREAU'S RESPONSE TO LAKE'S MOTION TO DISQUALIFY THE PRESIDING JUDGE to:

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And caused a copy of the foregoing to be served via hand-delivery to:

The Honorable Richard L. Sippel
Chief Administrative Law Judge
Federal Communications Commission
445 12th Street, S.W., Room 1-C861
Washington, DC 20554



William Knowles-Kellett